STATE OF MICHIGAN

COURT OF APPEALS

ERB LUMBER, INC., an assumed name of CAROLINA HOLDINGS MIDWEST, LLC, a Delaware Corporation,

Plaintiff/Counter-Defendant-Appellee,

v

DAVID A. PALMER, AMY H. PALMER, G.A. FRISCH, INC., and BOWEN PAVING, INC.,

Defendants/Counter-Defendants/Third-Party Defendants,

and

STANDARD DRYWALL,

Defendant/Counter-Plaintiff/Third-Party Plaintiff,

and

STATE OF MICHIGAN DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND,

Defendant/Counter-Defendant-Appellant,

and

JAMES LINCK,

Third-Party Defendant.

UNPUBLISHED
August 19, 2003

No. 235238
Oakland Circuit Court
LC No. 00-021586-CH

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

The State of Michigan Department of Consumer and Industry Services Homeowner Construction Lien Recovery Fund (the Fund) appeals as of right from a judgment in favor of Erb Lumber, Inc. (Erb). The Fund had moved for summary disposition, arguing that Erb was not entitled to recover a sum of money from the Fund, but the trial court rejected the Fund's argument. We reverse in part and remand for entry of summary disposition in favor of the Fund.

Linck, Inc. (Linck), a licensed residential builder, entered into a contract with David and Amy Palmer for renovations to the Palmer residence. Between November 13, 1998, and September 27, 1999, Linck placed sixty-seven orders for the purchase of materials on credit from Erb, twelve of which were placed between June 1, 1999, and July 15, 1999. It is this latter period that is involved in the instant dispute. Erb accepted and filled each of the orders, and when Linck withheld certain payments, Erb filed a lien against the Palmer's property.[1] Erb later sued to foreclose its lien, naming the Fund as a defendant under MCL 570.1205(4).[2]

The Fund moved for summary disposition of Erb's claim under MCR 2.116(C)(8) and (10). The Fund argued that under MCL 570.1203(3), a claimant seeking recovery from the Fund is required to establish that it has met various enumerated requirements, including that it complied with MCL 570.1201. The Fund contended that Erb had not in fact complied with MCL 570.1201 because it paid a special assessment of $50 on July 16, 1999, instead of paying the assessment by the deadline of May 31, 1999, which was established by the Fund's director. The Fund asserted that Erb was not entitled to recover payment for goods furnished to Linck between June 1, 1999, and July 15, 1999, because it had not paid the special assessment during that period.[3] The trial court rejected the Fund's argument, emphasizing that MCL 570.1201(2) does not provide a time limit in which any special assessment is to be paid and does not provide a penalty for non-payment of a special assessment.

We review de novo a trial court's decision with regard to a motion for summary disposition.[4] *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406

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[1] The lien did not attach to the residence because the Palmers filed affidavits stating that they paid Linck pursuant to their contract. See MCL 570.1203(1).

[2] Subsequently, the action grew to include numerous counter claims, cross claims, and third-party claims. These claims are not relevant to this appeal.

[3] The Fund did not argue that Erb was not entitled to recover for goods furnished on and after July 16, 1999, and does not contest that portion of the judgment awarding Erb payment for those goods.

[4] In evaluating a motion brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party is entitled to a judgment as a matter of law if the proffered evidence fails to establish a genuine issue with regard to any material fact. See *Maiden*, *supra* at 120-121. Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim on the basis of the pleadings alone. *Madejski v Kotmar Ltd*, 246 Mich App 441, 443-444; 633 NW2d

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(2001). We similarly review issues of statutory interpretation de novo. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. See *id.* at 312. If the language of a statute is clear and unambiguous, judicial interpretation is not permitted. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Provisions must be read in the context of the entire statute so as to produce a harmonious whole. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

The Construction Lien Act (CLA), MCL 570.1101 *et seq*., "is designed to protect the rights of lien claimants to payment for expenses and to protect . . . property owners from paying twice for these expenses." *Solution Source, Inc v LPR Assocs Ltd Partnership*, 252 Mich App 368, 373-374; 652 NW2d 474 (2002). The CLA creates the Fund, from which claimants can recover expenses. The Fund's resources come from membership fees and special assessments. See MCL 570.1201.

The CLA should be liberally construed to uphold the purposes of the Act. MCL 570.1302(1). However, this principle of liberal construction does not apply to the statutory requirements pertaining to a member's eligibility to recover from the Fund. See *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 183-185; 500 NW2d 733 (1993). The special assessment at issue here was due no later than May 31, 1999, but Erb did not pay it until July 16, 1999. MCL 570.1201(2) does not articulate a penalty for failure to pay a special assessment, and in the case of a voluntary member such as Erb, failure to pay a special assessment does not in and of itself carry any penalty. The failure becomes relevant only when the member seeks to recover from the Fund. MCL 570.1203(3) specifically conditions recovery upon a showing that the member has met various requirements, including complying with the provisions of MCL 570.1201, and MCL 570.1201(3) states that a member "shall not be entitled to recover from the fund unless he or she has paid into the fund as required by this section." This language clearly and unambiguously indicates that payment of any applicable fee or assessment is a prerequisite to recovery from the Fund. We therefore reverse in part the judgment of the trial court.

The evidence showed that on December 1, 1998, the balance in the Fund was below $1,000,000. MCL 570.1201(2) authorizes the Fund's director to require the payment of a special assessment under these circumstances, in order to replenish the Fund. MCL 570.1201(2) does not specify a time frame in which a special assessment must be paid. However, an agency has the authority to interpret the statutes it is bound to administer and enforce. *Clonlara, Inc v St Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). The Fund's director is authorized to manage the affairs of the Fund. MCL 570.1202(1). We conclude that the establishment of a deadline for

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429 (2001). "All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Id*. at 444. "Summary disposition under MCR 2.116(C)(8) is proper 'when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.'" *Corley v Detroit Bd of Ed*, 246 Mich App 15, 18; 632 NW2d 147 (2001), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

the payment of a special assessment was within the scope of the director's statutory authority and was necessary in order to meet the goal of having sufficient monies in the Fund within a reasonable time. Voluntary members such as Erb were given more than one month's notice of the deadline for payment of the special assessment. Erb's assertion that the establishment of this deadline constituted an abuse of discretion in light of the ninety-day period for payment afforded to licensed builders by MCL 339.2409(1) is without merit. Indeed, non-payment of a special assessment by a licensed builder, a mandatory member of the Fund, results in automatic suspension of all licenses and effectively renders a builder unable to operate or to recover at all from the Fund. MCL 339.2409(1); MCL 570.1203(3)(h). A voluntary member such as Erb faces no such curbs on its operation. The establishment of a deadline was within the statutory authority granted to the Fund's Director by MCL 570.1202(1), and Erb's failure to meet this deadline precludes recovery for the period in question.

The trial court erred by denying the Fund's motion for summary disposition and finding that Erb was entitled to recover for goods ordered between June 1, 1999, and July 15, 1999. We reverse that portion of the judgment awarding Erb recovery for goods ordered during this period.

Reversed in part and remanded for entry of summary disposition in favor of the Fund. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper